applicable in respect of disabled employees some deductions had in fact been made from the amounts received from the insurance company and that in no or virtually no case was the money paid to the estate of a deceased employee. In fact the defendant company had paid it to such persons as it considered to be the deceased's dependants which fact itself is incompatible with the defendant company being a trustee. DW1 had satisfactorily explained to the court that he was reluctant to produce the said policy as indicated in Item 30 in A because it might mislead inexperienced practitioners and involve the defendant company in avoidable litigation and that the proposal to amend the said policy was to delete any words which might suggest creation of a trust.

There is nothing to show that the defendant company had received any money from the insurance company in respect of Mr. G. R. Nair's disablement and Item 37 in A shows that only 60% of the total permanent disablement figure calculated on the unit basis amounting to $19,380 had been claimed and received by the defendant company in respect of Encik Mohamed Dom and out of that sum an *ex gratia* payment of $6,769.98 had been made to him after certain deductions as indicated in Item 41 in A had been made. Thus irrespective of the question of trust Mr. G. R. Nair's whole claim and Encik Mohamed Dom's claim insofar as the remaining 40% is concerned would fail as their actions are misconceived. As stated by Lord Wright in *Vandepitte's* case at page 79.

"...The action should be in the name of the trustee; if, however, he refuses to sue, the beneficiary can sue, joining the trustee as a defendant."

There are also other grounds on which the defendant company has contended that Mr. Nair's claim would also fail but in view of my findings above it is not necessary for me to deal with them.

In the event I dismiss both plaintiffs' claims with costs.

Claims dismissed.

Solicitors: *Jega & Co.; Mohamed Yaacob, Ibrahim & Gomez; Skrine & Co.*

LEE GUAT ENG v. SEET TIAM HOCK

[O.C.J. (Pawan Ahmad J.) December 13, 1973]
[Malacca — Civil Suit No. 159 of 1971]

Practice and Procedure — Order 14 — Default final judgment — Setting aside — Counter-claim — R.S.C. 1957, O. 64 r. 7 — Stay of execution.

The powers granted by O. 64 r. 7 in the interests of justice permit the setting aside of a final judgement entered under O. 14 where the defendant had defaulted in making payment into court within the time limited by the court under the O. 14 application.

Where there is a counter claim upon the hearing of an O. 14 application even if judgment is given for the plaintiff on his claim, there should be stay of execution pending the trial of the counter-claim or pending further order.

CIVIL SUIT.

R. R. Chelvarajah for applicant/defendant.

S. G. Thakuria for respondent/plaintiff.

Pawan Ahmad J. (delivering oral judgment): Upon the hearing of an application under Order 14 on 8th May 1972 certain orders were made, one of which was that if the defendant did not deposit the sum of $8,000 into court within two weeks, the plaintiff would be at liberty to sign final judgment for the sum of $8,000. The defendant defaulted in making the said payment and the plaintiff on 19th June 1972 entered final judgment against the defendant for the the said sum of $8,000.

By the same order, the defendant was given leave to defend the action as to the residue of the claim and since the defendant has delivered a counter-claim, it follows from this that he would also have liberty to proceed with his counter-claim.

The file indicates that on 14th July 1972 the plaintiff obtained leave to amend his statement of claim and the amended statement of claim was delivered on 20th July 1972.

The present application before the court has been made by the defendant by Summons-in-Chambers dated 24th October 1973. He asks the court to exercise its inherent jurisdiction and make an order:

(i) that the order made on 8th May, 1972 and the final judgment entered on 19th June, 1972 be set aside and that the defendant be given conditional leave to defend the action upon payment into court the sum of $3,000/- within seven days;

(ii) *ALTERNATIVELY*, that the order made on 8th May, 1972 be varied or amended in view of the pending counter-claim of the defendant by adding a further order to the order dated 8th May, 1972 that there shall be stay of execution of the judgment dated 19th June, 1972 until the trial of the counter-claim etc.

In his Affidavit in support of the present application, the defendant admits having defaulted in making payment into court of the sum of $8,000 within the time limited by the order. He had asked the court to consider paragraph 5 of his defence, his counter-claim and the agreement made between the parties on 29 July 1965 and prays that in view of the nature of his defence and counter-claim the court do make an order in terms of his application.

As for the extension of time for the payment into court of the sum of $8,000, it will be necessary to make reference to O.64 r.7 which gives the court the powers to enlarge or abridge the time appointed or fixed by an order "as the justice of the case may require". In exercising my discretion in regard thereto, I have taken into account the averments of the defendant in his affidavit dated 5th December, 1973 where he states that (a) the plaintiff immediately after signing the agreement of sale took possession of the land and is still in possession thereof and (b) that the plaintiff having erected and rented several buildings on some portion of the said land, has been and is still collecting and enjoying rents and profits from such lettings. Further on in the same affidavit, the defendant avers that he could not pay the sum of $8,000 within time "as he did not have any money with him then".

Having taken into consideration all the aforesaid matters and the submission of counsel, I am of the opinion that in this case the interests of justice require that the defendant should be allowed extension of time to pay the sum of $8,000 into court and accordingly there will be an order that the defendant be at liberty to make such payment within one week from the date of extraction of the order herein. In order to give effect to this order, the judgment entered by default will have to be set aside and I order accordingly.

Now, coming to the question of stay of execution, I think it will be necessary for me to quote a passage from the *Annual Practice* 1957 page 194 under the heading of "Counter-claim".

"... Where the defendant has clearly no defence to the plaintiff's claim but sets up a plausible counter-claim for an amount not less than the plaintiff's claim, the order on the plaintiff's application under O. 14 should not be for leave to defend but should be for judgment for plaintiff on the claim with a stay of execution till the trial of the counter-claim, or pending further order...."

In view of the above passage, I do not think it is necessary for me to go into other authorities cited by counsel. It is sufficient to say that where there is a counter-claim, upon the hearing of an Order 14 application, even if judgment is given for the plaintiff on his claim, there should be stay of execution pending the trial of the counter-claim or pending further order.

In view of the above, I am of the opinion that in the present matter, even if the defendant still makes default in making payment as aforesaid, and the plaintiff proceeds to enter final judgment by such default, there will have to be incorporated in the judgment an order that there will be stay of execution pending the trial of the counter-claim. I order accordingly.

The costs of this application will be costs in the cause.

Order accordingly.

TAY CHO KOH & ORS. v. TAY EK SENG CO. SDN. BHD. & ORS.

[O.C.J. (Pawan Ahmad J.) December 13, 1973]
[Malacca — Originating Summons No. 68 of 1973]

Practice and Procedure — Written judgment variation of.

An application to vary the terms of a judgment where the judgment correctly stated what was actually decided and what was intended to be decided and where the court had taken time to consider the matter before putting its finding in the form of a written judgment cannot succeed.

Cases referred to:-

(1) *Harrison* v. *Harrison* [1955] 1 Ch. D. 260.

(2) *Tong Lee Hwa & Anor.* v. *Chin Ah Kwi* [1971] 2 M.L.J. pg. 79.

ORIGINATING SUMMONS.

Thara Singh for applicants.

A. L. Taye for respondents.

Pawan Ahmad J. (delivering oral judgment): After the hearing of the Originating Summons, certain orders were made and in particular orders were also made in terms of prayers 1-A, 2 and 3. As to prayer 1-A there was an alternative prayer numbered as 1-B but after having taken into consideration the affidavits filed in the matter and the submission of counsel, it was my considered opinion that an order should be made in terms of prayer 1-A rather than the alternative prayer 1-B.

As to prayers 2 and 3, it is the applicants' own prayer that an order as to the calling of the meetings should be directed either to Tay Ek Seng Co. Sdn. Bhd., the first respondent company and/or the directors of the said company. Here again it is my considered opinion that the best persons to call the meeting are the directors of the first respondent company and I accordingly ordered that the meeting be called by them rather than by the first respondent company.

The solicitors for the parties were unable to agree on the draft order and on obtaining appointment appeared before the learned Assistant Registrar for settlement of the said draft on 30 October 1973. The Assistant Registrar quite rightly referred the matter in dispute to me for my determination. When the matter came up before me on 9th November 1973, I adjourned the matter into open court for argument but in the meantime M/s. Sault & Co., the solicitors for the applicants took out Notice of Motion dated 27th November 1973 praying for variation of the judgment delivered by me on 8th October 1973 and it is this Notice of Motion which was taken for hearing on 5th December 1973.

According to paragraph 5 of the affidavit of Tay Seck Huan in support of the Motion "the applicants are advised by their solicitors, that in view of the difficulties which may be created by the 2nd and 3rd respondents to cause the said judgment to become ineffective, that proper application should be made to this Honourable Court for an order varying the terms of the said judgment so as to closely follow the prayers contained in the Originating Summons herein in order to defeat any further delaying tactics which may be adopted" etc.

In their affidavit in reply the respondents contend that the application of the applicants is premature as there is nothing at this stage to indicate that there will be refusal on the part of the second and the third respondents to comply with the terms of the judgment and that if at all they should have come before the court only after having been satisfied that the terms of the judgment had in fact not been complied with. Counsel for the respondents also submitted that in essence the applicants have got the orders that they themselves asked for in their prayers and that it is not proper for them now to come before the court and ask the court to vary its judgment so as to forestall some anticipated or imaginary difficulties which might arise after service of the order on the respondents.

At the hearing of the motion before me, counsel for the applicants placed reliance on the case of *Harrison* v. *Harrison*.(1) At page 264 Roxburgh J. said:

"The modern practice has grown up from the decision in *In re St. Nazarie Co.* In *In re Roberts* Kay J. said that "where an order had not been drawn up, whether it were an order made in chambers or in court, the judge had a right, if something was brought to his attention which he had not sufficiently considered, to stay the drawing up of the order and rehear the matter before making the final Order."